



RE: FOIA Appeal Re: 10-FOI-00264-12 & HQ FOI-01421-12

Heese, Ruth Hamilton (LAW) to: Duffy, TJ (LAW), FOIA HQ

04/24/2013 09:14 PM

Cc: Cara Steiner-Riley, Stephanie Kercheval, Linda
Anderson-Carnahan, "Edenshaw-Chafin, Emily R (LAW)"

Clarification: This is a FOIA Appeal (not a request). Thank you.

Ruth Hamilton Heese
Senior Assistant Attorney General
Environmental Section
Alaska Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
ruth.hamilton.heese@alaska.gov
Phone: 907-465-3600
Fax: 907-465-6735

From: Duffy, TJ (LAW)
Sent: Wednesday, April 24, 2013 5:11 PM
To: hq.foia@epa.gov
Cc: steiner-Riley.Cara@epamail.epa.gov; Kercheval.Stephania@epamail.epa.gov;
Anderson-Carnahan.Linda@epamail.epa.gov; Heese, Ruth Hamilton (LAW); Edenshaw-Chafin, Emily R
(LAW)
Subject: FOIE request 10-FOI-00264-12 & HQ FOI-01421-12

To Whom This May Concern:

Attached, please find a FOIA request in the above-referenced matter from Senior Assistant Attorney General Ruth Hamilton Heese with the State of Alaska, Office of the Attorney General.

Any questions may be directed to Ms. Hamilton Heese at the email address above or by calling 907.465.3600. Thank you.

Respectfully,

T.J. Duffy, Law Office Assistant
Alaska Department of Law – Office of the Attorney General
P.O. Box 110300
Juneau, AK 99811-0300
907.465.3600 (main)
907.465.2520 (fax)



FOIE request 10-FOI-00264-12 & HQ FOI-01421-12

Duffy, TJ (LAW) to: FOIA HQ

04/24/2013 09:11 PM

Cara Steiner-Riley, Stephanie Kercheval, Linda
Cc: Anderson-Carnahan, "Heese, Ruth Hamilton (LAW)",
"Edenshaw-Chafin, Emily R (LAW)"

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Respectfully,

T.J. Duffy, Law Office Assistant
Alaska Department of Law – Office of the Attorney General
P.O. Box 110300
Juneau, AK 99811-0300
907.465.3600 (main)
907.465.2520 (fax)

I choose respect.

***** ATTACHMENT NOT DELIVERED

This Email message contained an attachment named
image001.jpg
which may be a computer program. This attached computer program
could
contain a computer virus which could cause harm to EPA's
computers,
network, and data. The attachment has been deleted.

This was done to limit the distribution of computer viruses
introduced

into the EPA network. EPA is deleting all computer program attachments sent from the Internet into the agency via Email.

If the message sender is known and the attachment was legitimate, you should contact the sender and request that they rename the file name extension and resend the Email with the renamed attachment. After receiving the revised Email, containing the renamed attachment, you can rename the file extension to its correct name.

For further information, please contact the EPA Call Center at (866) 411-4EPA (4372). The TDD number is (866) 489-4900.

***** ATTACHMENT NOT DELIVERED *****



FOIA request 10-FOI-00264-12 & HQ FOI-01421-12.pdf

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ENVIRONMENTAL SECTION

SEAN PARNELL, GOVERNOR

P.O. BOX 110300
DIMOND COURTHOUSE, 6TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-6735

April 24, 2013

VIA FIRST CLASS U.S. MAIL AND E-MAIL

National Freedom of Information Officer
U.S. EPA, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

Re: ***Freedom of Information Act Appeal***
Freedom of Information Request 10-FOI-00264-12 and HQ FOI-01421-12;

Dear Sir or Madam:

This is a Freedom of Information Act (FOIA) appeal under 40 C.F.R. 2.104(j), in response to the Environmental Protection Agency's (EPA's) April 15, 2013 response to a FOIA request submitted by the undersigned on behalf of the State of Alaska concerning EPA's efforts to develop a "watershed assessment" relative to potential mining in the Bristol Bay region in southwest Alaska, and potential action by in EPA in that region under Clean Water Act Section 404(c). The EPA's April 15, 2013 letter (copy enclosed) apparently constitutes EPA's final response to the State's FOIA request.¹

The State is compelled to file this appeal for the following reasons:

- (1) The EPA failed to provide sufficient detailed explanation for the information (totaling apparently more than 42,000 pages of documents) that EPA asserts – in sweeping fashion and by virtue of conclusory

¹ Please be advised that the State submitted a November 30, 2012 appeal to your office based on an earlier November 2, 2012 letter from EPA (also signed by Linda Anderson-Carnahan, Acting Director of the Office of Ecosystems, Tribal, and Public Affairs) in response to the State's FOIA request. Although EPA characterized its November 2nd letter as an "interim response," in the same letter EPA nonetheless apprized the State of Alaska of its right to appeal the FOIA response. Out of an abundance of caution – not knowing when EPA might complete the response or whether the response would be adequate – the State of Alaska appealed the November 2nd "interim response" to preserve its appeal rights. To date, your office has not responded to the State's November 30th appeal.

statements made in its April 15th cover letter – may be withheld under 5 U.S.C. § 552(b)(5)². Additional information is necessary to help the State determine whether the documents claimed by EPA as exempt were appropriately withheld, whether factual information was inappropriately withheld, and whether some information could be released with appropriate redaction. Further, to the extent any of the documents released to date by EPA in response to the State's FOIA have been redacted, the redacted information should be itemized with an associated explanation of the bases for each redaction. The explanation should also include for each document the type of document (e.g., email, draft report, data, modeling, scientific reports, analyses, etc.) withheld, identification of the author and recipients, the date of the document, and sufficient description of the document to correlate to the claimed exemption.

- (2) It is not clear from EPA's responses whether EPA has withheld from disclosure communications it has had with third persons/parties outside of the agency that would be responsive to the State's FOIA.
- (3) The EPA appears to have omitted or withheld relevant and responsive information that would reasonably be expected to have been produced, *i.e.*, copies of transmittal memos, cover letters, or other correspondence that EPA has had with the House Committee on Oversight and Government Reform or other congressional offices and staff and/or members concerning EPA's efforts at developing the watershed assessment for Bristol Bay region and potential action by EPA in that region under Clean Water Act Section 404(c).

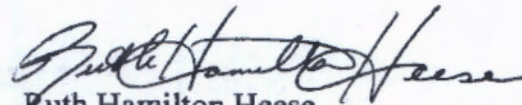
² 40 C.F.R. § 2.104(h)(1) and (2) notwithstanding, EPA failed to provide sufficient information in its April 15 letter to justify the claimed exemptions and EPA bears the burden of proving such exemptions apply. *Ethyl Corporation v. United States Environmental Protection Agency*, 25 I.3d 1241 (4th Cir. 1994.).

Thank you for your prompt attention to this appeal.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:



Ruth Hamilton Heese
Senior Assistant Attorney General
Alaska Bar No. 9406064

cc (via email):

Linda Anderson-Carnahan, EPA Region 10
Stephanie Kercheval, EPA Region 10
Cara Steiner-Riley, EPA Region 10



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

RECEIVED
APR 18 2013
Attorney Generals Office
Juneau
OFFICE OF
ECOSYSTEMS,
TRIBAL AND PUBLIC
AFFAIRS

April 15, 2013

Ruth Hamilton Heese
Department of Law
Office of the Attorney General
State of Alaska
P.O. Box 110300
Diamond Courthouse, 6th Floor
Juneau, AK 99811-0300

Re: Freedom of Information Act Requests 10-FOI-00264-12 and HQ-FOI-01421-12

Dear Ms. Hamilton Heese:

This is in response to your Freedom of Information Act (FOIA) requests first received by the U.S. Environmental Protection Agency on May 31, 2012, and subsequently modified on September 3, 2012, regarding potential large-scale mining in the Bristol Bay watershed, Alaska.

As you are aware, the EPA has already provided you with several interim responses to your FOIA requests:

1. On June 18, 2012, the EPA provided you with a link to the Bristol Bay FOIA Reading Room. This Reading Room contains copies of all formal correspondence between EPA and external parties, including all FOIA requests we have received and our cover letter responses to those requests. The Reading Room also contains a summary of the emails sent to EPA's Bristol Bay mailbox. EPA tries to update the Reading Room on a regular basis so that you may continue to have access to formal correspondence.
2. On October 10, 2012, EPA and the State agreed for purposes of responding to your FOIA that: a) for purposes of external communications, the EPA would provide you with all communications between the EPA and external parties that were responsive to your original FOIA requests; and b) for purposes of internal communications, you modified the requests to only internal email communications "since January 2009 regarding the idea to use preemptive veto authority...that involve one or more of the following: [list of 16 names]."
3. On November 2, 2012, EPA provided you with an interim response to your FOIA requests that included "the communications EPA has shared with the US House of Representatives Committee on Oversight and Government Reform on Bristol Bay regarding: emails and written communications between 14 EPA employees and non-federal external parties regarding the Bristol Bay watershed assessment and the possible application of Section 404 of the Clean Water Act to mining activities in the area."

4. On December 17, 2012, the EPA provided you with another interim response to your FOIA requests that included the remaining communications in the external database that were responsive to your original FOIA requests.

Enclosed with this letter are the remaining releasable records responsive to your requests. The following records are exempt from mandatory disclosure and are withheld by virtue of 5 U.S.C. § 552(b)(5) as inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Agency:

- Approximately 3,661 pages under FOIA Exemption 5, attorney-client privilege, consisting of internal emails and documents between or among EPA attorneys and EPA staff or management regarding Bristol Bay and the use of CWA Section 404(c) ;
- Approximately 38,979 pages under FOIA Exemption 5, deliberative process privilege. Of these pages, approximately 19,785 are communications about and drafts of the Watershed Assessment; approximately 7,130 are communications about and drafts of the appendices; and approximately 1,781 are other technical drafts and documents. These documents include a mention of CWA Section 404(c) but are primarily technical. In addition, approximately 444 pages are related to draft correspondence and approximately 9,839 pages are general deliberative materials including draft media materials, draft public presentations, internal briefing materials, talking points, draft Government to Government materials, budgeting and planning materials, and pre-decisional communications.

The EPA is also enclosing with this response an itemized invoice for **\$392.80** and payment instructions. As you have discussed with the EPA in the past, and in accordance with 40 C.F.R. § 2.107(c), as a requester in the "other" fee category, you receive two hours of search time and 100 pages without charge. For purposes of these requests, you are charged for the following EPA activities:

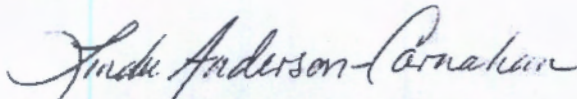
- Duplication costs associated with processing the EPA's communications with external parties on Bristol Bay, and the internal email communications of Richard Parkin and Phil North which were not addressed in a related Congressional document request received by the Agency;
- Additional records are included in this response without charge because there were no search or duplication costs associated with processing these records.

You have the right to appeal this determination. Submit your written appeal to the National Freedom of Information Officer at U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If you have any questions regarding this determination, please contact Cara Steiner-Riley, the EPA

attorney handling this matter at (206) 553-1142 or by email at steiner-riley.cara@epa.gov. This concludes the EPA's response to FOIA number 10-FOI-00264-12 and HQ-FOI-01421-12.

Sincerely,

A handwritten signature in cursive script that reads "Linda Anderson-Carnahan".

Linda Anderson-Carnahan, Acting Director
Office of Ecosystems, Tribal and Public Affairs

Enclosures

cc: Sheila Eckman, EPA
Stephanie Kercheval, EPA FOIA